

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-420

SCOTT MITCHELL HEISTER
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered NOVEMBER 19, 2008

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
[NO. CR-2006-411]

HONORABLE J. MICHAEL
FITZHUGH, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Scott Mitchell Heister pled guilty and was convicted of nonsupport, a Class A misdemeanor, on November 30, 2006. The trial court imposed a suspended sentence, which was revoked by order of January 2, 2008. The issue on appeal is whether the trial court's finding of willful and inexcusable failure to pay child support was in error. We affirm the trial court's order.

After appellant's guilty plea, he was given a suspended sentence of twelve months and ordered to pay \$750 in fines and \$150 in court costs at the rate of fifty dollars per month. In addition, appellant was ordered to pay \$100 per month toward child-support arrearages for twelve months, \$100 for his public-defender fee by January 1, 2007, and to make current child-support payments as previously ordered.

On July 23, 2007, the State filed a petition to revoke appellant's suspended sentence alleging that he had failed to make any child-support payments as ordered and had failed to pay the public-defender fee, his fines, and court costs all in violation of the terms and conditions of his suspended sentence. At the revocation hearing, Melissa Hall testified that she and appellant had a child together who was then ten years old. She claimed that appellant last paid child support in March 2007, when he paid \$1500 in order to get out of jail, and that he was making that payment in arrears. She admitted that appellant gave her \$100 the last time he had been to court.

Appellant testified that he was supposed to pay fines and court costs of fifty dollars per month, but that he had not paid. He claimed that after his father's death in December 2006, he had been trying to get his father's house ready for sale. He stated that he put the house on the market for \$45,000, and that his obligations will be paid when the house sells. He testified that he had not worked in 2007, but had been working on his father's house. He claimed that he began work one month prior to the hearing, but had not been paid for that work. He testified that he could have obtained a job but figured he would sell his father's house and make money on that. He admitted that he could have worked on his father's house in the nighttime hours and when he was off work if he had had a job. He stated that he had been living with his mother, and she was providing for him.

Based upon the foregoing, the trial court found by a preponderance of the evidence that he violated the terms of his release. Appellant filed a timely notice of appeal, and this appeal followed.

In order to revoke probation or a suspension, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. *Peterson v. State*, 81 Ark. App. 226, 100 S.W.3d 66 (2003). The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004). We do not reverse a trial court's findings on appeal unless they are clearly against the preponderance of the evidence, *Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003), and, because a determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the trial judge's superior position. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004).

Arkansas Code Annotated section 5-4-205 provides that when a court is determining whether to revoke a suspended sentence for failure to pay restitution, it shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on his ability to pay. Although a probationer cannot be imprisoned solely on the basis of failure to pay restitution, his failure to seek employment or make bona fide efforts to borrow money to pay restitution may support a finding that his failure to pay was a willful act warranting imprisonment. *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997); *Gossett v. State*, 87 Ark. App. 317, 191 S.W.3d 548 (2004).

The testimony of Melissa Hall, the mother of appellant's child, was that appellant had made no child-support payments since his release from jail in March 2007, when he paid

\$1542. Appellant testified that he had last worked in 2006 because he was taking care of his father who died in December 2006. He also testified that he had not worked in 2007, except for a month's employment for which he had not been paid, because he had worked on readying his father's house for sale. Appellant argues, therefore, that the record falls short of showing a willful failure to pay child support and demonstrates an inability to pay rather than a willful refusal to pay.

Appellant claims that when faced with the decision to seek employment or care for his dying father, he chose to care for his father. He then chose the most expedient source of cash, the sale of his deceased father's house, to satisfy his child-support obligation. He maintains that this decision does not constitute a willful refusal to pay. Appellant contends that the State failed to demonstrate by a preponderance of the evidence that he willfully and inexcusably failed to pay child support and fines.

As conditions for his suspended sentence, appellant agreed to pay a fine, court costs, child support, and child-support arrearages beginning with monthly payments of \$100 on January 1, 2007. Further, the State introduced, without objection, ledger records showing appellant's failure to pay the ordered fines and costs, and that he had not made regular payments toward his child-support obligations. Testimony at trial showed that appellant paid \$1542 as bail for release from jail on March 20, 2007, and that he paid Melissa Hall \$100 cash after a previous court proceeding. Appellant admitted he failed to make the payments for child support as ordered, and explained that instead of finding paid employment after his father died, he chose to repair his father's house in order to sell it. He added that he obtained

a paying job one month prior to the hearing, but that he had not been paid for his work. He admitted he could have been employed and worked on his father's house during the evenings or off-work hours. Accordingly, we hold that the trial court's revocation based upon appellant's willful and inexcusable failure to pay his fines and child support as ordered was not clearly against the preponderance of the evidence.

Affirmed.

VAUGHT and HUNT, JJ., agree.